No. [illegible]

APR 15 1

In The

Supreme Court of the United States

October Term, 1946

St. Louis-San Francisco Railway Company (Debtor), [illegible], as administrators of the Estate of P. G. Kessler, Deceased, [illegible], Administrator of the Estate of Robert E. Lee, Deceased; [illegible], Administrator of the Estate of Leonard E. Lee, Deceased, and [illegible], Administrator of the Estate of Elmer G. Lee, Deceased, Petitioners,

vs.

Fort Scott Reorganization Committee; Bankers Trust Company, Trustee for the Kansas City, Fort Scott & Memphis R. Co.; Frank Lyon Reorganization Committee, Central Hanover Bank & Trust Company, and David K. Catlin, Trustees for St. Louis-San Francisco R. Co. Prior Lien Mortgage; Consolidated Reorganization Committee, Chase National Bank of the City of New York and John A. Ash, Trustees for St. Louis-San Francisco R. Co. Consolidated Mortgage and Frank A. Tichenor, Trustee, St. Louis-San Francisco Railway Company, Respondents.

PETITION FOR WRITS OF CERTIORARI AND [illegible] TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

WILLIAM M. KINSEY,
[illegible],
Attorney for Petitioners.

[illegible],
[illegible],
Attorneys for Petitioners.

[illegible],
[illegible],
Attorneys for Petitioners.

[illegible],
[illegible],
Attorneys for [illegible] and John A. Ash, Appellees.

15750

TITLES OF CASES IN WHICH THIS PETITION IS FILED

LOLA BROOKS, Administratrix of the estate of F. S. Brooks, deceased, *Petitioner,*

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Debtor, et al., *Respondents.*

(No. 13105 in the Circuit Court of Appeals)

JOHN E. DIKIS, as Administrator of the Estate of Robert E. Lee, deceased, et al., *Petitioners,*

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Debtor, et al., *Respondents.*

(No. 13106 in the Circuit Court of Appeals)

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Debtor, *Petitioner,*

vs.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, and JOHN A. AID, Trustees under the Consolidated Mortgage of St. Louis-San Francisco Railway Company, et al., *Respondents.*

(No. 13107 in the Circuit Court of Appeals)

The following appeals have been taken from Orders entered in the reorganization proceedings in this cause:

Reconstruction Finance Corporation and the Railroad Credit Corporation appealed from an Order of the District Court returning the first certified Plan to the Commission for further consideration. These appeals were entitled:

RECONSTRUCTION FINANCE CORPORATION, *Appellant*,

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Debtor, et al., *Appelles*,

(No. 12471 in the Circuit Court of Appeals)

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and

THE RAILROAD CREDIT CORPORATION, *Appellant*,

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Debtor, et al., *Appellees*.

(No. 12472 in the Circuit Court of Appeals)

The issues were compromised November 23, 1943 and the appeals dismissed. The record on those appeals was printed and the printing has been by order of the Court of Appeals used as a printing of part of the record in these cases and is referred to in briefs as R. vol. , page .

The three appeals numbered 13105-6-7 in the Circuit Court of Appeals were consolidated for hearing on a record brought to date and by order of the Court of Appeals appellants and appellees printed appendices to their briefs incorporating parts of the record.

The Debtor appealed to the Circuit Court of Appeals from an Order of the District Court lifting the injunction against sale of collateral by the creditors and permitting bank creditors to sell the Debtor's own bonds held as collateral for indebtedness evidenced by notes. That Order was appealed to the Circuit Court of Appeals and the title is

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Debtor, et al., *Appellant,*

vs.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK and JOHN A. AID, Trustees under the Consolidated Mortgage of St. Louis-San Francisco Railway Company, et al., *Appellees.*

(No. 13108 in the Circuit Court of Appeals)

The Circuit Court of Appeals declined to consolidated this appeal with the preceding numbers. The Order of the District Court was affirmed. The procedure followed by the Court of Appeals makes necessary a separate petition for certiorari in this cause.

TABLE OF CONTENTS

	Page
Opinions Below	3
Jurisdiction	4
Questions Presented	4
Statutes Involved	8
Statement	8
Reasons for Granting Writ	16
Question 1	16
" 2	19
" 3	21
" 3a	25
" 3b	27
" 3c	28
" 3d	29
" 3e	31
" 4	34
Conclusion	35

TABLE OF CASES

	Page
Carter v. Kubler, 320 U.S. 43	32
Case v. Los Angeles Lumber etc., 308 U.S. 106	2
Consolidated Rock Products etc. v. DuBois, 312 U.S. 510	2
Cont. Nat'l Bk. v. Rock Island, 294 U.S. 648, 79 Sup. Ct. Law Ed. 1110	21
D&RGW v. Insurance Group etc., 150 F. 2d, 28	18, 22
Ecker v. Western Pacific etc., 318 US. 448	2
Gange Lbr. Co. v. Rowley, 90 Sup Ct. Law Ed 80	19
Group etc. v. C. M. & St. Paul etc., 318 U.S. 523	2
Kansas v. Hurley, 169 Fed. 92	26
Louisville & Nashville, 76 ICC 718	16
Pacific Tel. Co. v. Kuykendall, 265 U.S. 196	18
People v. American Loan & Trust Co., 172 N.Y. 371	26
Sexton v. Dreyfus, 219 U.S. 339	25
Shaffer v. Carter, 252 U.S. 37	18
Smith v. Illinois Bell Telephone Co., 270 U.S. 589	18
Young v. Higby, 89 Sup. Ct. Law Ed. No. 9,578	27
221 ICC (Finance) 199	9

TABLE OF STATUTES

Page

11 U.S.C.A. §201 (Section 73) 2, 8

11 U.S.C.A. §205 (Section 77) 2, 8

11 U.S.C.A. §1200-1255 29

28 U.S.C.A. §347 [Judicial Code §240(a)] 4

OTHER AUTHORITIES

Senate Report 952 on Senate Bill 1253 (Appendix B hereto) ..... 22 et seq.

Report of House Judiciary Committee No. 1615 dated June 8, 1944 22

Vol. 1 Receivership Proceedings, St.Louis-San Francisco Rway. Co., p. 25 8

Report of I.C.C. to Congress of 1944 at p. 7-8 ..... 13, 16

Annual Report of 1944, St. Louis-San Francisco Rway. Co. 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. ..... Original

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY et al.,
Petitioners,

VS.

FORT SCOTT BONDHOLDERS' COMMITTEE, et al., *Respondents.*

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

The Debtor, St. Louis-San Francisco Railway Company, on behalf of all interests it is privileged to represent by the terms of Section 77 of the Bankruptcy Act, and Lola Brooks, Administratrix, and John E. Dikis, Administrator, respectively representing creditors of the Debtor holding judgments for personal injuries for $4,000 and $17,500 respectively,* pray for writs of certiorari to review an Order of the Circuit Court of Appeals of the Eighth Circuit entered on the 8th day of February, 1946, approving a Plan of Reorganization of Debtor's financial structure which was proposed by the Interstate Commerce Commission and certified to the District Court for the Eastern District of Missouri on the 4th day of July, 1944 and October 2, 1944.

* The total of unsecured claims has not been adjudicated but the estimated amount is $400,000.00.

The Plan denies to the Debtor and its stockholders any participation, present or contingent, in the reorganized company, and likewise gives no recognition to any creditor except bondholders whose claims are secured by mortgage or by the deposit of Debtor's own bonds as collateral. (Appellees Appendix Page 867).

The questions submitted by petitioners are of general concern to all having an interest in railroad reorganizations under Sections 73 and 77 of the Bankruptcy Act.* They involve—

(1) Vital questions of appellate procedure under the Act upon which there is confusion evidenced by diversity of views between the Circuit Court of Appeals of the Eighth Circuit and the Circuit Court of Appeals of the Tenth Circuit;

(2) A diversity of view and decision as to the right of the Debtor to represent the rights of unsecured creditors not otherwise specially represented and urge the protection of such rights in any Plan, as evidenced by the diversity of view between the Circuit Court of Appeals of the Eighth Circuit, which does not recognize such right, and the Circuit Court of Appeals of the Seventh Circuit, which does recognize it, the position of the Circuit Court of Appeals of the Seventh Circuit being supported by the views of at least one Federal District Court, to-wit, Judge Hincks of Connecticut, and,

(3) A mistaken application of the decisions of this Court in the four leading reorganization decisions,† which has resulted in preventing the District Court in this case (and other courts in other similar cases)

(a) from performing their judicial function as courts of bankruptcy and equity to recognize applicable

* Section 73 is Title 11, Section 201 of U.S.C.A., and Section 77 is Title 11, Section 205 of U.S.C.A.

† *Case v. Los Angeles Lumber etc.*, 308 U. S. 106; *Consolidated Rock Products etc. v. DuBois*, 312 U. S. 510; *Ecker v. Western Pacific etc.*, 318 U. S. 448; *Group etc. v. C. M. & St. Paul etc.*, 318 U. S. 523.

rules of administration of assets in *custodia legis* so as to relieve the debtor of a substantial part of the burden of its debts made possible by favorable operating results and cash accumulations, and furthermore to recognize the rights of unsecured creditors to an interest in the debtor's property undiminished by the accumulation of interest during administration in favor of mortgage creditors;

(b) from exercising the specific and additional powers given to the courts by Section 77 by which the court through its trustees, if so disposed, could use the assets in its hand and by negotiation and agreement with individual creditors reduce the burden of principal debt and interest accumulating at high rates during administration;

(c) from making a thorough judicial search to determine on what basis of fact any creditor or stockholder is to be justifiably excluded from further recognition and whether there is evidence on the record to support such action.

Petitioners ask permission to submit to the Court the question whether this Court in the Ecker and Milwaukee cases, in which *approval orders* were involved, assumed that by proceedings taken in the district court subsequently thereto steps would be taken, by foreclosure in accordance with debtors' covenants or otherwise pursuant to lawful consent of the debtor in composition, to forfeit the equity of debtors, and whether it intended to hold that the interest of a debtor or any creditor's interest could be lawfully expropriated by fiat.

OPINIONS BELOW

The Opinion of the Circuit Court of Appeals is certified in the record and printed as Appendix C to this petition.

The Opinion of the District Court approving the Plan is reported in 59 Fed. Sup. 417.

The Finance Reports of the Interstate Commerce Commission (printed in the Submission Pamphlet) are reported in 240 ICC 383, 242 ICC 523, 257 ICC 399, 717.

JURISDICTION

The Order of the Circuit Court of Appeals was entered on the 8th day of February, 1946.* The jurisdiction of this Court in invoked under Section 240a of the Judicial Code, as amended by the Act of February 13, 1925 (28 USC, §347).

QUESTIONS PRESENTED

1. Was it proper practice for the Court of Appeals to consider and rule upon an appeal from an Order of the District Court approving a Plan of Reorganization while there was duly pending in the same Court of Appeals an appeal from the Order of the District Court confirming the Plan, which latter appeals stands undisposed of without hearing on the merits?

2. Does Section 77 give the Debtor right and authority to represent the claims of unsecured creditors to whom the Plan makes no allowance of new securities?

3. Have the Federal District Courts and Courts of Appeal mistakenly misinterpreted the decisions of this Court so as to prevent them from carrying out measures incident to the administration of the assets and affairs of the Debtor which, under bankruptcy rules and consistent equity rules, they have the duty and jurisdiction to perform in their judicial character as courts having property and rights in *custodia legis* and so as to prevent them from performing additional judicial administrative duties relative to the application of income and the adjustment of debts, the power and authority for which is granted by Section 77, to-wit:

> **(a) If the stated capitalization of Debtor's assets represents a worth or value in terms comparable with Debtor's debts, and that worth is in excess of the**

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* Appendix C.

principal as of May 16, 1933 of the claims of all creditors now having claims against the Debtor (after uncapitalized cash available is used to reduce the principal of those debts) bankruptcy does not permit the accrual of interest during administration in favor of one creditor to the prejudice of another if, as here, the creditors are looking for payment to a distribution of a common fund. (This does not apply to a creditor who takes his security out of the fund and either waives all rights in other assets or seeks to prove with other creditors against the common fund for deficiency.)

Has this Court held that this rule is not to be applied in the administration of Debtor's assets?

We submit that the Court of Appeals acted upon the assumption that it has, and that, in consequence, the rights of unsecured creditors were erroneously denied.

(b) The Trustee of the District Court has in hand an excess of $1,000,000 unmortgaged cash.

Do the decisions of this Court require the application of this cash to the claims of mortgage creditors who have not established a deficiency claim by foreclosure of their security?

The Court of Appeals has made it clear that the unsecured creditors must in some way so share these unmortgaged assets with the mortgage creditors that the share of the unsecured creditors,* would be inconsequential. If this is true, it means that the court can estimate a deficiency claim not established by foreclosure. We believe that this result was reached in mistaken understanding of the decisions of this Court and that this Court did not intend to say that the ordinary rules for allocating a debtor's property among its creditors by a court of bankruptcy were superseded by Section 77.

(c) By the rules of bankruptcy administration and consistent equitable principles, and having in mind

* Erroneously assumed to be $21,000.

the mandate of Section 73, the bankruptcy court should make all possible payments on the principal claims whenever assets in its hands are available for distribution and it is not concerned with interest accumulated during administration until on *liquidation* (not contemplated by Sec. 77) it is proved that debtor's assets exceed the principal of all creditors' claims. All impounded earnings are added to the mortgage security and they are distributable on principal of the secured claims and in equity reduce the accumulation of interest. If retained by the court they are borrowed and interest thereon should be allowed to creditors not at the contract rate but at a lower rate at which the court can obtain the money elsewhere.

The District Court and the Court of Appeals have refused to so apply and allocate accumulated earnings in excess of $135,000,000. Such a refusal can be predicated only on the assumption that this Court has held that after the Debtor's assets come into the hands of the court they *must* be distributed according to a plan which makes whole all creditors for principal and interest during administration without the benefit of customary bankruptcy accounting during the period of administration.

We believe this Court has not so held.

(d) It appears that Section 77 gives to the bankruptcy court new powers superimposed on the ordinary powers of the court, which new powers are substantially equivalent to the powers of a board of directors of debtor's corporation to use its assets and earnings for the betterment and strengthening of its financial structure. By the exercise of these powers, plus the inherent powers which a court of equity enjoys to use the assets in its hands to insure the doing of all things required in the public interest, the debt burden of the Debtor could have been during the administration—and yet can be—reduced by refunding bonds at reduced interest rates, purchasing bonds in

the open market with all interest accumulations at less than par, and in various and sundry other negotiated ways.

The interpretations put upon the decisions of this Court above referred to by the lower Federal courts prevent the exercise of such powers by the District Court because if a Plan of Reorganization *must* provide for the satisfaction of the principal of all creditors' claims plus all interest accumulated at contract rates during administration, it is inconsistent to use Debtor's assets for the purpose of discounting admitted claims.

We submit that no such result was intended by this Court in any of its decisions.

(e) It is assumed by the District Court in this case, and affirmed by the Circuit Court of Appeals, that if the Interstate Commerce Commission hears *all possible evidence* its conclusions are beyond correction by the courts. This position follows from the view that this Court has declared the law to be that a Plan may be based on an estimate of future earnings and that the Commission's estimate thereof is conclusive.

We submit that this Court has not relieved the District Court and the Circuit Court of Appeals of the duty to examine the evidence and determine whether *all the evidence* does or does not furnish a factual basis for the estimate of future earnings.

4. The District Court and the Court of Appeals assume that the language of the Court used in the consideration of the *approval* Orders which were before this Court in the *Ecker* and *Milwaukee* cases is a controlling decision that compels them to hold that when an order of *confirmation* is entered such *final order*, which is *dispositive* of Debtor's interests by fiat based on estimates, cannot be challenged under the Fifth Amendment to the Constitution. There is grave doubt whether such is the effect of the language of this Court used in the *Ecker* and *Milwaukee*

cases and parties whose large interests have been expropriated are not content to submit uncomplainingly until the constitutionality of such a *dispositive* order is definitely settled by this Court.

STATUTES INVOLVED

Sections 73 and 77 of the Bankruptcy Act (now Title 11 section 201 and Title 11, section 205 USCA) are the statutes involved and the pertinent parts thereof are printed in Appendix A.

STATEMENT

On November 1, 1932 a bill on behalf of all creditors of the Debtor was filed by Hobbs Western Company, plaintiff, alleging, inter alia,

> "although the property and assets of the Railway Company at their fair value are greatly in excess of the Railway Company's liabilities yet at the present time the Railway Company is unable to pay its obligations as they mature in the regular course of business or otherwise to provide for them."*

and asking for the appointment of a receiver. On said date a receiver was appointed to take possession of Debtor's assets, including in excess of one million dollars of unmortgaged cash.

On May 16, 1933, Debtor filed a petition for corporate reorganization in the district Court of the United States for the Eastern District of Missouri, Eastern Division, submitting therewith a reorganization plan bearing the final date of April 10, 1933, providing for a comprehensive readjustment of Debtor's obligations, including authorization to purchase and retire certain items of debt at substantially less than the face thereof (R vol. 1, p. 66).

Hearings began before the Interstate Commerce Commission on the proposed Plan, which had been agreed to by the corporation and more than 66% of each class of all

* Vol. 1, Receivership Proceedings, page 25.

mortgage creditors. On the 17th day of March A. D. 1937 the proposed Plan was rejected by the Commission.*

Hearings on a modified Plan were resumed before the Commission on the 8th day of February A. D. 1939.

On the 6th day of July, A. D. 1940 (Supplemental Report November 16, 1940) the Interstate Commerce Commission proposed its own Plan. This plan was certified to the District Court, objections were filed by the mortgage creditors to the treatment of the Reconstruction Finance Corporation and the Railroad Credit Corporation, and by the Consolidated Bondholders' Committee to their treatment as compared to other creditors, and by the Debtor.

The Plan was rejected by the District Court and returned to the Commission.

The Reconstruction Finance Corporation and the Railroad Credit Corporation appealed to the Circuit Court of Appeals of the Eighth Circuit from the Order of the District Court sending the Plan back to the Commission. This appeal was taken on or about February 4, 1943. Pending the appeal no progress was made in further hearings before the Interstate Commerce Commission.

On or about the 23rd day of November, 1943 the Reconstruction Finance Corporation and the Railroad Credit Corporation by agreement with the mortgage creditors compromised their claim and for a payment of $5,800,000 the claims were released.

On the 16th day of February A. D. 1944, hearings were resumed before the Interstate Commerce Commission and the mortgage creditors proposed a new Plan. On July 4, 1944 the Interstate Commerce Commission reported a new Plan which conformed substantially to the creditors' Plan. (The Commission's Supplemental Report was dated October 2, 1944.)

On March 16, 1945 the District Court having heard the objections of the Debtor and Brooks Admx., and Dikis

* 221 I. C. C. (Finance) 199.

Adm'n., entered an order approving the Commission's Plan.

The Debtor and Brooks and Dikis appealed from the Order of Approval to the Circuit Court of Appeals of the Eighth Circuit. These appeals are described on the first page of this petition. They were consolidated in the Circuit Court of Appeals for hearing and disposed of by the Order of the Circuit Court of Appeals dated the 8th day of February, 1946.*

Following the appeal to the Circuit Court of Appeals from the Order of Approval the Commission submitted the Plan to mortgage creditors for acceptance or rejection by vote, and the Plan received from them an enthusiastic majority.

Thereafter, and on the 15th day of November, 1945, the District Court entered a confirmation order.

The Debtor and Brooks and Dikis promptly appealed from the Order of Confirmation, a motion was made before the Circuit Court of Appeals to have the record as made and printed in Nos. 13105-6-7 (the cases here involved) made available as part of the record on the appeal from the Order of Confirmation. The creditors moved the Circuit Court of Appeals to dismiss the appeal from the Order of Confirmation without hearing on the merits. At this writing these motions remain undisposed of.†

During administration approximately $38,000,000 has

* There is a group of bank creditors holding notes aggregating in excess of $5,106,000 as collateral for which bonds of the Debtor of the face value of more than $8,000,000 are held. During the reorganization proceedings the sale of this collateral has been stayed, but on the 17th day of April, 1945, the District Court lifted the stay. An appeal from that action was taken to the Circuit Court of Appeals and in that case the Cause is No. 13108, St. Louis-San Francisco Railway Company, Debtor, appellant, v. The Chase National Bank of the City of New York and John A. Aid, Trustees under the Consolidated Mortgage of St. Louis-San Francisco Railway Company, et al., appellees. That cause was not consolidated in the Circuit Court of Appeals and Debtor is compelled to file a separate petition for a writ of certiorari to review the Order of the Circuit Court of Appeals in that cause which was entered concurrently with the orders in Nos. 13105-6-7.

† Petition for Rehearing, C. C. A. Page 1.

been applied to pay claims as they existed *(principal and interest)* on May 16, 1933, as follows:

Equipment Trust Claim—principal	$18,712,000.00
interest	436,772.50
Birmingham Bonds	6,517,170.00
Kansas City & Fort Scotts—principal	791,067.00
interest	516,700.00
Prior Lien Bonds—interest	2,476,779.00
Consolidated Bonds (4½s and 6s)—interest	2,736,862.00
Reconstruction Finance Corporation $5,190,000 claim settled for	4,504,575.00
Railroad Credit Corporation $3,805,175 claim settled for	1,300,000.00
	$37,991,926.20

The original claims as of May 16, 1933 include the principal of debt plus accrued and unpaid interest to that date. Of such original claims roundly $268,200,000 remain unpaid. (Interest on these claims during administration is not included in this figure.) There is today well over $35,000,000 of cash available for the payment of principal of these claims, leaving $233,000,000 of principal to be satisfied by Debtor's assets. If the cash in hand could be used to buy up Debtor's securities at market the burden of the principal of its debt would be drastically reduced. Over and above the last stated amount is the unsecured debt estimated at $400,000.

In the Courts assets there is more than $1,000,000 unmortgaged cash earned before November 12, 1932, which is the date when a receiver was appointed. The fund is of vital importance to the unsecured creditors.

If, as Debtor contends, the distribution of $63,000,000 to the secured creditors is applicable to principal, the principal of these claims is further reduced, and if the entire distributable earnings approximating $135,000,000 are, as Debtor contends, chargeable to principal, the reduction will be greater, but the last mentioned reduction will be offset by the court's obligation to the secured creditors

for a part of the earnings on their security borrowed by it. Some of these earnings were attributable to the Kansas City & Birmingham division and some to Equipment Trusts. A careful accounting is necessary to determine what credits and charges should be made.

In the above computations we have purposely omitted the inclusion of approximately $100,000,000 of an interest claim representing what is claimed to be an amount legally accumulated *pendente lite* according to the terms of the mortgage indentures. We believe that Debtor is entitled to have this claim given equitable scrutiny under all the facts and circumstances; that the Commission has no official competency to fix the claims involved and that the court has failed to give any attention to them because of its misinterpretation of the decisions of this Court. If this demand for interest *pendente lite* is equitably appraised, even the Commission's notion as to the worth of Debtor's assets would demonstrate an equity in the Debtor. A re-examination of that worth in the light of conditions now known would greatly increase that equity.

In the view of the Commission and Court there remains of the original claims $269,711,460 in principal amount. In the opinion of the Debtor a substantial part of this indebtedness could have been minimized by the equitable application and the prudent use of the earnings which the court has realized from the operation of Debtor's property.

The maturing of a Plan of Reorganization has been delayed in most part by controversies between the creditors. The Commission and Court take the view that the interest *must* be allowed to accrue at contract rates during administration and that the unpaid interest remaining after the distribution of approximately $63,000,000 due to the mortgage creditors other than those whose obligations have been wholly retired has left an accumulated burden of interest *pendente lite* amounting to approximately *$100,000,000.* Debtor challenges the allowance of so great an interest charge and claims that by the use of the powers

given to the court by Sections 73 and 77 its debt burden could have been greatly reduced, and complains that because of the mistaken belief that this Court has ruled to the contrary, no substantial effort in that direction was made. The aggregate indebtedness principal and interest adopted by the court and the Commission is, therefore, $366,000,000 roundly, as of January 1, 1944.

On May 16, 1933 the book value of the Debtor's stockholders' interest (15,000 to 16,000 of them) was approximately $80,000,000. Notwithstanding the assumed accumulation of interest the book value of the stock is now more than $35,000,000.*

From the time the Debtor was released from Federal control until the collapse of the industries served by it in 1930 the property earned an average of $9,100,000 per annum over contract charges (1920-30). During the Depression it failed to meet those charges by an average of $8,900,000 per annum (1931-40). Since the revival of industry in the territory served by it, it has earned for the years 1941-45 inclusive an average, roundly, of $7,800,000 per annum over and above fixed charges (after deducting all income and excess profits taxes). This earning figure is arrived at after the deduction of large wartime amortization in the years 1944 and 1945.

The "earning power" which is demonstrated before the deduction of income and excess profits taxes for 1941-1945 inclusive averages $15,000,000 per annum over contract interest charges.†

The trustees have earned net operating income (to end of 1945) approximating $135,000,000,‡ and have had

* As of Dec. 31, 1944. It is more at this time.

† The report of the Interstate Commerce Commission to Congress of 1944, at pages 7-8, says:

"The net income before deduction of income and profits taxes deserves attention as indicating the earning power of a railroad with the existing rates, fares, expenses and traffic volume." See Committee Report No. 925, Senate, Appendix B, page 62.

‡ Annual Report of 1944.

the advantage of approximately $49,000,000* in depreciation deductions. This has made available to them in cash approximately $184,000,000 to be used for the benefit of Debtor and its property.

The accrual of interest at contract rates during the period of administration to the end of 1945 was approximately $164,000,000.

The compromise of the claims of Reconstruction Finance Corporation and Railroad Credit Corporation resulted in a diminution of principal debt by $8,995,000, which was more than the cash payment made, and stopped the running of interest on those claims. The payments for low interest bearing Equipment Trusts, approximately $18,712,000 principal, and for the retirement of the Birmingham bonds, approximately $6,517,170, were of much less benefit to Debtor's estate than would appear to have been possible of attainment if the same amount of cash had been used to acquire bonds of other issues at market, thereby reducing debt and tolling interest in far greater amounts than the cash payments which were actually made.

$63,000,000 in cash was used to pay interest on bonds, most of it on interest which accrued during administration at contract rates, which for some years have been far above the current money market. When these payments were made the court reserved the right to reallocate, but has refused to reallocate.

Many of the bonds on which interest was so paid could have been purchased in the market at the time of such payments at much less than par and the bond and all accrued interest retired.

Approximately $72,000,000 of earnings plus $49,000,000 depreciation reserve was withheld by the court and used for additions and betterments and other purposes (including the retirement of debt above mentioned). Instead of treating this amount above depreciation reserve as a borrowing and paying interest at rates at which money was ob-

* Total is shown by adding Trustee's reports of depreciation for '33-'44.

tainable elsewhere in the market, it was not so accounted. Interest was allowed to accrue at the old contract rates on the old debts and the opportunity to relieve the Debtor of the accumulating burden in large part was not taken advantage of. Debtor has persistently and consistently objected to the accumulation of such interest.

Over $37,000,000 in income and excess profits taxes have been paid to the taxing authorities by the trustees, although the creditors impounded the earnings and they had the right to demand them for addition to their security and distribution to themselves.

Because of these policies of court administration the apparent spread between the large debts as figured by the Commission and the court, and the low dollar figure assigned to the new securities and shares by the Commission is greatly increased.

The Commission assigned a stated value of $50 per share to the new stock which it authorized. This results in an assumed capitalization of $247,000,000. Even this figure exceeds the principal of all remaining secured creditors' claims and is ample to provide for the recognition of Brooks and Dikis as judgment creditors, and all other unsecured creditors.*

In the first Plan certified by the Commission (July 6, 1940, November 16, 1940) the Debtor's assets brought by it into court were assumed to justify a "capitalization" of $240,000,000. Since that time there bave been invested in additions and betterments by the trustees over $30,000,000 cash. In the latest capitalization of $247,000,000 (Commission report of July 4, 1944) not to exceed $7,000,000 added capital is possible to be attributable to this added investment.

* The mortgage creditors claim that the Birmingham bonds and the RFC and RCC claims were acquired by the use of funds belonging to the mortgage creditors and that they are subrogated to those claims. It is not easy to detect the effect of this subrogation as increasing the amounts of their claims. This claim seems to support the Debtor's contention that the earnings belonged to the creditors and should be charged to them and treated as borrowed by the court.

There has been abandonment of 900 miles of road that has served its usefulness to the betterment of net income of approximately one million dollars per annum. At the Commission's rate of capitalization (5%) this would account for $13,000,000 additional capital over and above the $7,000,000 which was in fact added. There have been new permanent (not war) industries located on the line of the road which are yielding $5,000,000 per annum new net income. No increase of capitalization can be detected because of this factor. By applying the Commission's method of computation it would justy $100,000,000 of added capitalization.

There is now more than $30,000,000 cash in the hands of the trustee not capitalized,* but certainly available for the payment of obligations at par and, we believe, available for the purchase of securities at market.

Therefore, we believe that with a proper accounting of the true indebtedness and a just appraisement of the new securities as a currency for exchange for the debts the spread between debts and assets will not only be closed but unsecured creditors will be recognized and an important equity for the Debtor will be established.

There is not the slightest question about the physical excellence of Debtor's railroad, the need for it in the National Transportation System, the economy with which it can operate or the present public demand for its service.

REASONS FOR GRANTING WRIT

Question 1.

Section 77 provides for an Order of Confirmation "subject to the right of judicial review" (§77-f). This is the order which *disposes* of Debtor's assets by the allocation of securities based on them. If none are allotted either

* In the Commission's Report of October 2, 1944, the Commission answered Debtor's objection that substantial assets were not capitalized by referring to the case of *Louisville & Nashville*, 76 I. C. C. 718 (see page 343 of appellees' appendix). This case holds that cash above working capital is not capitalizable. It certainly is the best possible asset for use in reducing debts.

to an unsecured creditor or the debtor there is a total expropriation of such interests. The distribution of securities is made in accordance with the confirmation order (§77-f). A confirmation order is referred to in the statute (§77-j) as the "final decree".

All appellate practice is grounded on the rule that an aggrieved party may have his rights considered at a full and free hearing on review by an appellate court directed to the *final decree.* The right of a litigant to such a plenary review on final decree ought not be left obscure.

Section 77 injects an order of approval into the sequence of procedure. It is obvious that until final decree it cannot be known whether the proposals in the *approval* order will be incorporated in the order of confirmation. There are votes to be taken (§77-e). Changed conditions may justify dismissal (§77-g). A dismissal order may be conditioned on a change of the Plan.

Faced with the threats inherent in an *approval* order a denuded debtor has no clear road to relief. If he stands by and lets the proceeding go on without taking every step in protest open to him he may lose his rights. If, as here, he *appeals* from the *approval* order and it is affirmed, he is faced with the same problem in connection with an application for review by this Court. It is obviously a confusing problem to one who should have a full hearing and decision on any *final order* which expropriates his property.

In a case where no order of confirmation has been entered it might be profitable to inquire whether on an appeal to the Circuit Court of Appeals there is more for it to do than to advise the bankruptcy court that there are features of the approval order which, if carried out, will not be lawful even if by subsequent steps the bankruptcy court should in a lawful way forfeit the excluded interests.

There seems to be a question whether the Court of Appeals should not say that the lawfulness of a debtor's exclusion will not be decided until on a consideration of the

final decree the Court of Appeals can know what steps have been taken to forfeit the debtor's interest.

But these problems would seem to disappear when, as here, the Court of Appeals has before it the final order of confirmation. By hearing on such order of *confirmation* the whole matter can be examined and disposed of. It would seem that so long as the appeal from the *order of confirmation* is undisposed of no approval order or other intermediate or interlocutory order made in the progress of the proceedings should be ruled upon.

The Eighth Circuit in this case has ruled on the appeal from the Order of Approval while the appeal from the Order of *Confirmation* is pending before it.

In the case of *Denver and Rio Grande Western v. Insurance Group et cetera,* (150 Fed. 2d, 28), (a case which at this writing stands on certiorari in the Supreme Court), the Tenth Circuit Court of Appeals had before it an appeal from the *approval* order taken by the Debtor. At the argument of that appeal it was informed that the District Court was about to *confirm* the Plan and that an appeal from that Order would be taken. It stayed its proceedings until the appeal from the Order of *Confirmation* taken by the General Mortgage and the Debtor was lodged, then gave a prompt hearing and disposed of the case.

This Tenth Circuit procedure recognized the *merger* of the two judgments and followed the analogy of the cases in this Court wherein appeals from orders on application for interlocutory injunctions and appeals from final orders in the same suits were concurrently pending here,* and it was held that the proper course was to dispose of the matter in the final orders.

The Circuit Court of Appeals of the Eighth Circuit was advised on the 14th day of January, 1946, that an Order confirming the Plan would shortly be brought before it. (See paragraph *8th* of Order of June 25, 1945.)

* *Shafer v. Carter*, 252 U. S. 37; *Pacific Tel. Co. v. Kuykendall*, 265 U. S. 196; *Smith v. Illinois Bell Telephone Co.*, 270 U. S. 589.

It was so advised at oral argument on appeal from the Order of Approval had at St. Louis on the 12th day of November, A. D. 1945. It was so advised by a brief filed with it in this cause on the 17th day of November, A. D. 1945. On the 14th day of December, 1945, Debtors' appeal from the order of *confirmation* was lodged in that court.

Notwithstanding these transactions the Court of Appeals treated the question as though no appeal from *confirmation* were lodged with it. It used the following language:

> "* * * it is suggested that the decision of this case be held until it is determined whether there will be an order of confirmation brought to this court on appeal and that such an appeal should be considered before we decide the issues on the present appeal."

There is a major conflict on an important point of appellate practice in which the two Circuits are diametrically opposed. The Eighth Circuit did not follow the clear analogy in the cited decisions of this court.

The *approval* order is not dispositive. Problems arising from the Fifth Amendment to the Constitution cannot be solidly raised upon its review. It is not the threat of the *approval* order but the mandate of the order of *confirmation* which delivers the hurtful blow. When that blow falls the right to appeal to the protection of the Constitution accrues.* The whole case is not matured until the final decree—a dispositive order—is entered.

Question 2.

The rights of judgment creditors and unsecured creditors are treated by the Circuit Court of Appeals as confined to the claims of Brooks and Dikis aggregating $21,500 principal, but there are other such claims estimated to total $400,000. These are treated as unrepresented. The Debtor's claim of right to represent them is ignored.

In the matter of the New Haven reorganization, Dis-

* *Gange Lbr. Co. v. Rowley*, 90 Sup. Ct. Law Ed. 80.

trict Judge Hincks of Connecticut, at a pretrial conference, said:

> "The New Haven, Debtor, as it appears to me is acting in a fidicuary capacity, primarily for junior equities although in a broader sense for all the composit securities."

In No. 8930 in the Circuit Court of Appeals for the Seventh Circuit the Debtor (Chicago, Rock Island and Pacific Ry. Co.) has appealed from the order of the district court approving the Commission's Plan of Reorganization. A motion to dismiss the appeal was made on the ground that the errors alleged by the debtor were presented in behalf of certain dissatisfied creditors. The court upheld the right of the debtor to represent such creditors and denied a motion to dismiss.

Section 77 (c) (13) provides that "the debtor • • • shall have the right to be heard on all questions arising in the proceeding."

In this case the Eighth Circuit says:

> "As compared with the claims of bondholders their claims are so small that their share would be negligible if indeed not infinitesimal."

The extent to which the total of unsecured claims represented dominated the court's' judgment is not made clear. It is evident that $21,500 might be too unimportant to justify investigation of the problem involved, but $400,000 is not

If, however, the Circuit Court of Appeals means to hold that $1,000,000 or more of cash accumulated and in hand before the Debtor's property was put in *custodia legis* and any demand for the impounding of income was made, will be absorbed by deficiency claims in favor of secured creditors and that the amount of such claims can be determined without compliance with the terms of the mortgage indentures which require foreclosure, then the problem is involved in the problem of interest as between creditors.

A solution of this question requires that asset value must be set off against the principal of the creditor's claims as of May 16, 1933. These problems are referred to under Question 3 and in a solution of these problems the right of the Debtor to represent unsecured creditors is extremely important.

Question 3.

Section 77 is a bankruptcy act. It as held to be constitutional because it rested on bankruptcy powers.*

The bankruptcy court, through its trustees, is given title to debtor's assets in trust for the creditors and the debtor. Equitable title *in rem* are created and attach on the filing of the petition. The bankruptcy court has ancient administrative principles and processes for the administration of all debtor's assets that come into its hands. These are designed to insure equality and uniformity. Nothing in Section 77 disturbs those processes so far as they affect the preservation of debtor's assets, the adjudication of claims and the application to such claims of distributions made to creditors.

If a Plan of Reorganization results, the rights of creditors to distribution may be satisfied by allotting securities in a going corporation. *This is not liquidation.* The creditors' claims are what *at the end of bankruptcy administration* they are found to be. They may or may not be reduced during administration. The debtor's assets may be much more or less valuable. The rights of the parties—the basis of distribution—are adjusted to the date of filing the petition.†

The proceeding may not produce a Plan. If not, the property will be turned back to the debtor. But the court of bankruptcy which handles it *pendente lite* should, we believe, exercise its powers to the fullest, not only the normal powers but any extraordinary powers given to it by

* *Continental National Bank v. Rock Island*, 294 U. S. 648, 79 Law Ed. 1110.

† Section 77 (1).

Section 77, in order to facilitate the objective specially stated in Section 73.*

Under Section 77 the court is given extraordinary power to act for the benefit of the estate for the relief of debtors and in the public interest. If such extraordinary powers are used to that purpose they could, where necessary, modify the normal rules of administration. If normal rules in bankruptcy or equity can be used to further the important purpose of the extraordinary powers it would seem to be the duty of the court to so use them.

Our eyes cannot be shut to the fact that both the House and Senate are severely critical of the ruthless treatment of unsecured creditors and debtors in cases so far closed and cases in process of being similarly treated.†

The obvious lack of equity in these Plans was noted by Judge Phillips in his Special Concurring Opinion in the D&RG case.‡ Judge Evans of the Seventh Circuit on the argument of a motion to dismiss the appeal of the District Court's approval of the Rock Island Plan used the remarks printed as Appendix D to this brief. In earlier decisions Judge Evans followed meticulously the language of this Court as he understood it when he participated in the confirmation of the Chicago, Milwaukee & St. Paul and the Chicago Northwestern Plans. His language in those cases has greatly influenced the decisions of other courts. He is now troubled with the gravest doubts.

As the lower courts read the decisions of this Court there is not the remotest opportunity to give relief to debtors so long as the Depression conditions from which relief was promised are used as a dominant or even important basis for estimating the future worth of railroads in Section 77. In fact, if applied to many roads not in 77

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* "* * * courts of bankruptcy shall exercise original jurisdiction in proceedings for the relief of debtors." (§73 of Bankruptcy Act.)

† In the House see Report of House Judiciary Committee No. 1615 dated June 8, 1944, in support of the Hobbs Bill which has passed the House. In the Senate see Senate Report 952 on Senate Bill 1253 which is epitomized in Appendix B hereto.

‡ (150 Fed. 2d 28.)

the estimated earnings capitalized as the Commission does, it would show a large deficit in assets compared to debts.*

But if the decisions of this Court were not believed to paralyze the bankruptcy powers, both normal and extraordinary, given to be used to relieve the Debtor in the same plenary manner in which the Debtor itself could act, the debt structure of the Frisco and other roads could be altered, no one forced to take less of cash or security than he or his class might agree to, and the properties would be ready to turn back to the Debtor. At least an effort could have been made with as great a promise of success as was reached by the roads not under 77.† This is true even on the basis of Depression values and more clearly evident on presently demonstrated values.

As the language used by this Court has been read and followed, the lower courts have felt compelled to accept the Commission assumption of worth, hence they have seen no alternative but to pay all admitted debts (compromise and allow disputed claims) either in cash or new securities after accumulating interest at contract rates. They have insisted on paying par and interest to creditors who were constantly disposing of their claims on the market at huge discounts.‡

Furthermore, the "brigading" of court and Commission left large gaps in the definition of their respective powers. The result has been that a "Depression valuation" of Debtor's assets which later events showed to be ridiculously low but which has received court "approval" has not been changed because the Commission waits for the court's direction and the court feels powerless to require a correction of the Commission's figures.§

In the earlier stages of the statute's operation and at the time this court considered the cases before it, the part

* Courts continue to treat the Commission's capitalization as representative of some value. In some cases it clearly fluctuates in relation to debts and not in relation to any kind of value for the property.

† See Senate Report, pages 85, 88, 89, Appendix B.

‡ See Senate Report, page 79, Appendix B.

§ See Senate Report, page 88, Appendix B.

of the court in administering the estate was not a major concern. The Depression earnings furnished little ammunition with which to accomplish the necessary debt adjustment preliminary to a final Plan or as a part thereof.

The last five or six years have provided huge earnings with which to do the job. This Court never has had before it the problems of administration presented by the opportunity to use such sums for Debtor's benefit. In this Frisco case $135,000,000 of earnings and $49,000,000 of depreciation reserve have been available to the trustees and would have been available to the Debtor to make necessary adjustments and reformations in the debt structure.

In this Frisco case most of the lowest interest bearing debt (equipment trusts) was paid at par and interest. This cash could have been much more beneficially used and equipment trusts refunded.

Some senior bonds, par and interest, were paid. Interest included in the principal of certain claims was paid in a small amount. This was helpful. Compromise was made with the RFC and the RCC. The compromise was initiated by the creditors and no one objected. It was a beneficial transaction but comparatively small in amount.

Huge blocks of bonds were purchasable in the market at large discount which, if made, would have wiped out the principal of the bonds and large interest accumulations.*

Speculators were allowed to buy bonds which the holders were *willing* to sell but this Debtor's assets and earnings were held in "chancery" and not used for its benefit and for the strengthening of unretired bonds. It has been helpless and paralyzed. There is yet in the hands of the court's Trustee more than $30,000,000 which can be used to carry out such policy. Courts of equity should be able to devise a way to provide for the recoupment of the damage that has been done to the Debtor and give it benefits in interest adjustments which it should have received.

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* See Senate Report page 85, Appendix B.

We make this statement of the situation encouraged by the support given in the Report filed by Senators Wheeler and Reed on behalf of the Senate Interstate Commerce Committee. We have epitomized that report in Appendix B to this brief. We submit that this Court did not intend to paralyze the courts in that field of the bankruptcy courts' administrative powers by any ruling it has heretofore made.

Question 3(a).

If at the end of the court's administration the assets in the hands of the court exceed the principal of all claims—as they do in this case—can unsecured creditors be cut out by the accumulation of interest *pendente lite* in favor of secured creditors?

Let it be admitted that some equitable allowance of interest, either in full or adjusted to the circumstances of the case, must be recognized before anything can be allowed to the Debtor.

As between creditors there is no right to seize the *in rem* right of any creditor accrued to him as of the date the Debtor's petition was filed (May 16, 1933) to pay interest to another creditor.

Sexton v. Dreyfus, (219 U.S. 339) held specifically that a secured creditor could not even take his security out of the court's hands and apply any of the proceeds to interest *pendente lite* before computing a deficiency claim, that to permit this to be done would be to permit the accrual of interest to increase the deficiency claim and that bankruptcy would not permit this to be done as against other creditors.

No ruling of this Court has changed this rule.

"Claims" in bankruptcy are the claims which share in common assets. Secured creditors may waive their security and have a "claim" for their whole debt, or they may realize on their security in accordance with the provisions of the bankruptcy act and possibly have a "claim"

for deficiency. Judge Walter H. Sanborn of the Eighth Circuit* said:

> "* * * the status of claims at the time of the filing of the petition in bankruptcy and not at any subsequent time fixes the rights of their owners to share in the distribution of the estate of the bankrupt."

Judge Vann of the Court of Appeals of New York† in an equity case stated the rule and gave the reasons fully.

> "If the funds in the hands of the court could have been distributed on the same day that the receiver was appointed, no claim of interest could have arisen, for there would have been no delay and no suspension of legal remedies. The delay in distribution, however, was the act of the law itself, and was essential for various purposes and among others to enable the creditors to prove their claims. (As a general rule, after property of an insolvent passes into the hands of a receiver or of an assignee in insolvency, interest is not allowed on the claims against the funds.) *Thomas v. Western Car Co.*, 149 U.S. 116.) Interest should not run in favor of one creditor at the expense of another, while the law, acting for all, is administering the assets. If the assets are sufficient to pay all, including interest, it must be paid, for as against the corporation itself interest should be allowed before the return of any surplus to the stockholders. As between the creditors themselves, however, no interest should be allowed during the process of administration, and the delay necessarily resulting therefrom, because the assets are equitably their assets, the administration is for their benefit and the delay is necessary to enable them to take action to present their claims in proper form, as well as to enable the court to put the assets in shape for distribution.
>
> "As the decree of dissolution relates back to the

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* *Kansas v. Hurley et al.*, 169 Fed. Rep. 92.

† *People v. American Loan & Trust Co.*, 172 N. Y. 371.

day when the court took possession of the assets, the delay is not the act or omission of the corporation, which is *civiliter mortuus*, but is owing to the law and hence should operate neither to benefit nor prejudice any creditor. Distribution should be made as of the date when the delay began, for it was not only caused by the law but was necessary for the protection of all classes of creditors. As between the creditors themselves, therefore, interest ceases to accrue upon their respective claims, whether preferred or unpreferred, from the day when the corporation let go and the court took hold. This rule is so simple and easy of application that it will not only tend to prevent litigation, but will stimulate all creditors to frown upon delay and to promptly call the receiver to account. It will not unduce preferred creditors to rest easy in reliance upon the expectation that they will make money through the misfortune of the corporation and, during the entire period of administration, receive interest at a greater rate than they had contracted for."

At this writing it appears to us that this Court has not held otherwise.

Only secured creditors who seek the exclusive benefit of their security and do not seek to share in the assets upon which they have no lien (except for a deficiency) can have interest *pendente lite* out of the proceeds of that security as against other creditors. Nothing in Section 77 can be pointed out which abrogates this rule. We submit that this rule is a bankruptcy rule which has the same reason for surviving as the rule referred to by this Court in *Young v. Higby.**

Question 3(b).

The secured creditors have impounded the income from their respective divisions and their liens attached to the earnings. The $1,000,000 delivered by the Debtor to the

* (89 Supreme Court Law Ed. No. 9, 578.)

Receivers appointed November 1, 1932 would not be made subject to the lien by the impounding order.

If the mortgage creditors should foreclose their mortgage and mature a deficiency they could rightfully claim for the deficiency with the unsecured creditors. Or they may waive their secured position and share with other creditors in all assets. They will hardly waive their security.

Pending a Plan the secured creditors are not required to make any election nor would they willingly accept a Plan which did not recognize their debts and priorities as they may be at the end of administration. Thereby they retain their secured position. We do not understand that they are "preferred" creditors in bankruptcy. Neither have they conditioned their debts for any deficiency claim.

Evidently the Circuit Court of Appeals believes that what this Court has said abrogates the applicable bankruptcy rules. If so, this Court has held that appraisement and fiat may take the place of the right of unsecured creditors to have deficiencies determined through foreclosure as provided in the mortgage indentures and that a deficit may be estimated and that the unsecured creditors may be overwhelmed as a result of such estimate, and that this can be done without the finding of dollar values.

We believe this Court has not so held and submit that that it should not do so.

Question 3(c).

It seems to be the settled law of bankruptcy administration that no attention need be paid to interest *pendente lite* until the principal of all creditors' claims is paid. If assets (cash) are distributed by the court they are first applied to the payment of principal of all claims. No interest should be paid until that principal is all paid. This is a just application of payments because failure to do so may result in final orders which forfeit the interest of some beneficiary of the court's administration.

Out of the earnings $63,000,000 was paid to secured creditors. It was not applied on principal.

The creditors have impounded as part of their security $135,000,000 of earnings and have a right to demand the earnings of the court unless the court withholds the earnings for the purpose of carrying out its policies.

We submit that it is just that the entire earnings be charged to the creditors as payment on the principal. If the bankruptcy court keeps a part of the earnings to carry on its program it borrows it. This is the reality. The bankruptcy court then has the power and right to fix the rate of interest on the borrowed money at the rate at which it could obtain it in the market. On that theory the bankruptcy court has borrowed in excess of $70,000,000 from the creditors and it should fix the rate of interest that it will allow, and it should allow no more than the market rate at which it could borrow on the security of the assets in its hands. Instead of treating the accounts in that way the bankruptcy court has allowed the debts of the secured creditors to stand unreduced by the earnings and to accumulate interest at the contract rates, which are substantially in excess of the market available to the bankruptcy court. That court believes this course to be necessary because of the decisions of this Court. We submit that no such result was intended.

Question 3(d).

The Wheeler-Reed Report has graphically demonstrated that had it not been for debt maturities fixed long years ago and fortuitously falling at unfortunate dates, many of the roads that had to seek refuge in Section 77 would have been free to utilize the Adjustment Act* or act without the cooperation of the Interstate Commerce Commission and refund and readjust their debt and capital structure and escape disaster.†

We submit that the extraordinary powers given to

* 11 U. S. C. A., § 1200-1255.

† Senate Report, page 57, Appendix B.

bankruptcy courts under Section 77 could have been utilized to bring about the same beneficient results that were accomplished by companies outside that jurisdiction. The reason it has not been done is because the bankruptcy courts have interpreted the decisions of this Court to mean that they cannot do it.

By Section 77(b) authority is given to modify or alter the rights of creditors generally or of any class of them, secured or unsecured, either through the issuance of new securities of any character, or otherwise. Like powers as to stockholders are given. There is no thing that a debtor can do that the court is not authorized to do by means of a Plan. There is nothing which requires everything to be done at once, or changes to be put into effect at one and the same time.

By subsection (c) (2) all the title is put in the court's trustees. Under subsection (g) the court is given broad power in dismissing the proceedings if administration does not proceed with reasonable speed, and he is the judge of what is "reasonably expeditious".

There was a first time when a railroad came into the custody of a court. That court was faced with a "public interest" in the handling of the property. Strong chancellors in equity had no difficulty in concluding that it must satisfy that public interest and that it could pledge all the assets in its hands to accomplish that purpose.

Under Section 77 the "public interest" extends to "financial engineering" and full powers are given to the court to handle the problem. By extending the principle long recognized to the newly declared public interest there is ample power under 77 to do anything the Debtor could do to readjust the finances and use the assets in the court's hands to secure capital for that purpose.

At all times it has been possible within the powers given the court for the trustees to negotiate refundings, purchases, alteration of securities, and to sell refunding bonds at reduced interest rates to those willing to purchase

or exchange them for existing bonds, or to buy in the market the bonds which as the Senate Committee demonstrates* the holders were willing to sell, or exchange new securities with willing holders of the old securities. Up to the middle of the Depression the Trustees were not in funds. Undoubtedly it needs cash to be used in making such adjustments but since cash has been accumulating no steps have been taken except to pay off low interest bearing securities and prior claims at par and interest. These transactions are no relief at all to debtors who are frozen and paralyzed by their inability to handle their own assets. These things have not been done by the trustees or the courts because they have read the decisions of this Court to mean that there is nothing to do but to provide out of the assets for the payment in full as far as the assets will stretch of the principal and interest of secured claims.

If this Court did not mean to so confine the bankruptcy court, it is not too late to accomplish, through a decision by this Court, all the beneficial relief that the House and Senate are seeking to accomplish through new legislation.

Question 3(e).

A reference to page 286 of the Appendix to the joint brief of appelles filed in the Circuit Court of Appeals of the Eighth Circuit shows the response which the Commission made to a request of the Debtor for findings of fact. This request was made in order that the factual basis on which the Commission acted in expropriating Debtor's property might be clearly disclosed. Previously the Commission had used general findings of the type now prohibited to Federal Courts by Rule 52a Federal Rules of Civil Procedure. We believe the answer to the findings discloses that no factual basis except some assumption as to future earnings was so used.† We are referred in the answer to the request for a finding as to future earnings to the report itself and we find there no definite estimate of future earnings.

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* Senate Report pages 83-85, Appendix B.

† Appellees' Appendix page 286.

It is true that the Commission heard all evidence that was offered. Not a witness made an estimate of future earnings lower than $23,000,000 in distributable earnings before the deduction of State and Federal income and excess profits taxes. It is certain that the testimony of these witnesses was not accepted. If the Commission arrived at any other notion as to future earnings it was due to some knowledge of their own not disclosed on the record. We believe the process was exactly the same as the fact finding process condemned by this Court in *Carter v. Kubler.*•

The Debtor asked the District Court and again the Court of Appeals to look at the testimony and see what evidence supported such an assumption of value as the Commission made. It was not in the book record of investments, it was not in reproduction cost less accrued depreciation, it was not in the record of normal earnings which had shown an excess of $9,000,000 a year over fixed charges. It could have been in Depression earnings but the use of Depression earnings as a sole or dominant basis flouts the very object of Section 77. No relief is possible for any road subject to that jurisdiction if its future is measured by the Depression. An examination of the findings of the Commission shows that the assumed value could have no relation to any factor except the assumed future earnings based on the Commission's guess.

In recent testimony before the Senate Interstate Commerce Committee Commissioner Porter testified† as follows:

> The process is one of "making intelligent guesses. For this purpose we studied the past history that was before us, we had the testimony of men who were regarded as in a position to make the most intelligent guess as to what the future might hold and starting from that complete record up to the minute that it was submitted to us we tried to make up our minds as best we could on that."

• (320 U. S. 43.)

† Senate Report, page 65, App. B.

In the case of the Frisco the Commission did not have the testimony of anyone giving a guess as to the future earnings at a level less than the $23,000,000 per year before income and excess profits taxes.

Both of the courts below showed that they made no investigation of the testimony. The Circuit Court of Appeals expresses the attitude towards the problem as follows:

> "In view of the very extensive investigation by the Commission of every element or factor having any conceivable bearing on the question of future earning capacity, including the condition and nature of the physical properties, the past earnings record and all circumstances which bear upon the question of future earnings or value it cannot reasonably be said that the Commission assumed anything."

It is obvious that any conclusion as to future earnings is an assumption. In one sense an assumption of future earnings is not subject to judicial proof.

Is it true that large property interests can be expropriated on such an assumption without even a word of testimony by any witness as to what, in the judgment of the witness, those earnings might be? If so, it means that property can be expropriated (permanently) on an administrative guess inherently quarantined from court review. If it be true, then the Circuit Court of Appeals did state the rule, only in other language. And it might be stated in another way, to-wit:

> If the administrative body took all the evidence there was, their conclusion is final and the court has no duty to examine the evidence and see whether there is anything to support it on the record.

We do not believe that this Court has intended that result. We do not believe it has relieved the District Court and the Circuit Court of Appeals of the duty to examine the evidence and determine whether all the evidence does or

does not establish a factual basis for the factual guess upon which expropriation is predicted.

There is another and germane question involved. A court of equity will not forfeit anyone's interest unless the factual basis is clearly proved. It abhors forfeiture. It will not participate in the creation of conditions which result in forfeiture.

Does the fact that the evidence upon which a forfeiture is to be predicated is first heard by an administrative body force the court of equity into a position where it must abandon its salutary rule and accept a scintilla in place of clear proof?

We humbly ask that this Court unfreeze the lower courts and let them operate as courts of bankruptcy and equity in the administration of the railroads in their possession. There are vital functions to be performed for the benefit of the Debtor that the Interstate Commerce Commission is not officially qualified to perform and we believe does not wish the responsibility of performing.

Question 4.

The readjustment of a debtor's affairs by the process of composition in bankruptcy is traditional and well understood. An essential of that proceeding is the assent of the debtor and the assent of adequately represented creditors. Proceedings under Section 77 have progressed on the fiat basis. Parties rights are threatened with alteration or complete destruction without their consent.

We are well aware that this Court has clearly indicated in the *Ecker* and *Milwaukee* cases that it saw no violation of the Fifth Amendment either for lack of due process or because of confiscation in the public interest

If the debtor's property may be taken without its consent the rights of creditors can be changed without their consent, at least it would so appear. The *Ecker* and *Mil-*

waukee decisions were made on approval orders. Those orders disposed of no one's property. At the time those cases were presented the patries had their own reasons for presenting the cases to this Court as they did.

The petitioner is also here on an approval order but because it has to do so, so long as the appeal from the Order of Confirmation stands undisposed of.

We believe that it would be salutary if this Court should indicate that it does not consider that it has determined the constitutional questions that would be directly and clearly presented on a consideration of a dispositive order of confirmation.

CONCLUSION

Because the courts of bankruptcy and the Circuit Courts of Appeals have understood the decisions of this Court to forbid administrative activities by the courts in the field of debt adjustment beyond the function of considering a Plan of Reorganization certified by the Commission which leaves no alternative but the satisfaction of all claims with legal interest in full accrued *pendente lite* (as far as the assets of Debtor will reach),

a. Unsecured creditors are cut out by the accumulation of legal interest *pendente lite;*

b. Debtors are thereby submerged under a great burden of accrued interest and denied an opportunity through the use of assets to have both principal and interest of debts discounted.

It is of great importance to the just and orderly progress of proceedings under Section 77 that the bankruptcy courts should be instructed as to their powers and duties in the premises.

The practice and procedure in the hearing and determination of the rights of parties should be clarified. A final consideration of an order of confirmation should be

the judicial act prerequisite to the divestment of the rights of any party or the investment of rights in others.

We respectfully pray that this petition should be granted.

Respectfully,

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